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December 6, 2004

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338

Dear Ms. Dortch:

The Promoting Active Competition Everywhere ("PACE") Coalition, Talk America Inc. and Broadview Networks, through their undersigned counsel, respectfully submit this letter in the above-captioned proceedings to respond to incumbent local exchange carrier ("ILEC") claims that the Commission should adopt an abbreviated transition plan for mass market local switching, or none at all.[1] As discussed below, if the Commission declines to require ILECs to unbundle local switching under section 251(c)(3) in any market, then the Commission should reaffirm the transition plan adopted in the *Triennial Review Order*, with the modifications proposed by the PACE Coalition, et al. in its comments.[2] It is essential that the

1 *See, e.g.,* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Andrew D. Crain, Associate General Counsel, Qwest (Nov. 17, 2004).

2 Comments of the PACE Coalition, Broadview Networks, Grande Communications, and Talk America Inc. at 91-94 (Oct. 4, 2004) ("Comments of the PACE Coalition et al."). The PACE Coalition, Talk America, and Broadview propose that the Commission make the following three refinements to the transition plan set forth in the *Triennial Review Order*. First, the Commission should adjust its transition plan to recognize that there are exceptions to a general finding of no impairment, such as 'no facilities' situations, that require continued unbundling. Second, the transition plan must identify the preconditions

Commission provide a robust transition plan to minimize disruption to end user customers and to preserve competition for mass market consumers by providing CLECs the time necessary to develop and implement next-generation business plans wherever economically and operationally feasible. The Commission has ample authority in this area and must reject ILEC arguments that competitive local exchange carriers ("CLECs") had notice of potential rule changes such that the Commission is not justified in providing the competitive industry and the more than seventeen million UNE-P customer lines with a viable transition mechanism.[3]

The transition plan for mass market local switching that the Commission promulgated in the *Triennial Review Order* tracks the three-year transition period for new line sharing arrangements adopted in the same order.[4] No carrier challenged the Commission's *Triennial Review Order* transition plans for unbundled mass market switching or line sharing arrangements. Indeed, since the *Triennial Review Order* transition plan for local switching was not appealed and consequently was not addressed by the D.C. Circuit in *USTA II*,[5] that transition plan remains part of the Commission's rules. It is not one of the remand issues that the Commission must revisit in this docket. The Commission need only reaffirm it as the framework and incorporate the refinements identified in the comments of the PACE Coalition, et al.

In adopting its local switching transition plan, the Commission identified the "most critical aspect" of the plan as the need "to avoid significant disruption to the existing customer base served via unbundled local circuit switching so that consumers will continue to have access to their telecommunications service."[6] The Commission recognized that more than ten million residential and small business lines then were being served by CLECs via unbundled local switching arrangements and structured its transition plan to ensure that those ten million

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that must be in place for line migrations to occur. Third, the plan must recognize the additional processes needed from the ILECs to facilitate the transition of customers and carriers to next-generation business plans and services.

3 Of course, the Commission should continue to require ILECs to provide local switching as an unbundled network element under section 251(c)(3). In its initial comments, the PACE Coalition et al. demonstrated that the Commission's national finding of impairment in the *Triennial Review Order* is appropriate. In particular, the PACE Coalition et al. demonstrated that the evidence developed in the state proceedings held in response to the Commission's *Triennial Review Order* overwhelmingly supports the Commission's finding that CLECs are impaired in their ability to provide traditional voice services in the absence of unbundled switching. *Id.* at 39.

4 *Triennial Review Order*, ¶ 264.

5 *United States Telephone Association v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

6 *Triennial Review Order*, ¶ 529.

lines would not experience significant disruption.[7] In the fifteen months since release of the *Triennial Review Order*, the number of customer lines served via unbundled local switching has continued to grow. Today, over seventeen million residential and small business lines receive service via unbundled local switching.[8] Consequently, the need to put in place a transition plan that protects these customers from service disruption is significantly more compelling today than when the Commission adopted the *Triennial Review Order*.[9]

Further, in adopting its local switching transition plan the Commission acknowledged the "need for an orderly transition to afford sufficient time for carriers to implement any necessary business and operational plans and practices to account for the changed regulatory environment."[10] The Commission took note of the fact that CLECs may need to develop new provisioning systems, purchase and collocate new equipment, create additional customer services and maintenance groups, revise billing systems, and develop E911 and local number portability capabilities and that eliminating unbundled access to local switching on a "flash cut basis" would not afford CLECs the time necessary to complete these tasks.[11] The same considerations apply today. If unbundled local switching is eliminated, CLECs will be compelled to completely revamp the way they provide service to the more than seventeen million residential and small business customers served via unbundled local switching today and it is

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7 *Id.*, ¶ 532, n. 1629 ("As an initial matter, we note that at the time of this Order's adoption, there are over ten million customers receiving local service over unbundled local switches. Chairman Powell concedes that the Commission has the discretion to set forth reasonable transition periods and, given the enormous number of customers that may potentially be affected, we believe that three years is a reasonable amount of time.").

8 Quarterly Earnings Statements of the Regional Bell Operating Companies (3rd Q. 2004). Moreover, based on these filings, it is estimated that approximately 70% of the lines are used to serve residential customers, with 30% used to serve small business customers. These proportions roughly parallel the relative size of the residential and small business markets.

9 Similarly, in adopting its line sharing transition mechanism, the Commission stated that "the purpose . . . [wa]s to minimize disruption to customers...". *Triennial Review Order*, ¶ 266.

10 *Id.*, ¶ 529.

11 *Id.* Broadview Networks, Talk America, and Eschelon Communications provided the Commission with a detailed timeline depicting the tasks required to build a switch site, establish collocation cages and establish interconnection with the ILEC. *See* Letter to Marlene Dortch, Secretary, Federal Communications Commission, from Rebecca M. Sommi, Vice President, Broadview Networks, CC Docket No. 01-338, CC Docket No. 96-98 and CC Docket No. 98-147 (Nov. 21, 2002).

impossible to expect that carriers will be able to develop and fully implement these new business arrangements in less than the three years afforded in the *Triennial Review Order*.

Finally, the *Triennial Review Order* transition plan for local switching required the ILECs to continue to unbundle local switching for a limited period after a finding of no impairment. The Commission concluded that to hold otherwise would force a CLEC "to halt its advertising and customer acquisition activities between the time the state commission issued its findings and the time the competitive LEC was able to serve its customers via alternative facilities."[12] Similarly, the Commission's line sharing transition plan permitted carriers to continue to obtain new line sharing arrangements during the first year of the three-year transition period with no increase in cost even though there were no more than 0.3 million line sharing arrangements in place at the time.[13] The local switching transition plan arrived at in this proceeding must contain the requirement that ILECs continue to unbundle local switching for a reasonable period of time after any non-impairment finding takes effect. This criteria is essential to ensure that CLECs, especially smaller CLECs that are not engaged in other lines of business, have the on-going ability to provide revenue-generating services while they design, build, and deploy new business models.[14]

The Regulatory Flexibility Act of 1980, as amended ("RFA"),[15] obligates the Commission to identify the possible impact that any proposed action could have on small entities[16] and to take steps to minimize any significant economic impact of its final rules on small entities. The requirements of the RFA compel the Commission to consider separately the negative economic impact that the elimination of unbundled local switching will have on the carrier members of the PACE Coalition, Talk America, and Broadview Networks,[17] and to apply

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12 *Id.*

13 *Triennial Review Order*, ¶ 265. *See also High Speed Services for Internet Access: Status as of December 31, 2002*, Industry Analysis and Technology Division, Federal Communications Commission, Table 5 (rel. June 10, 2003).

14 At a minimum, the transition plan must permit CLECs to service existing customer accounts. CLECs must be afforded on-going access to unbundled local switching during the transition plan to meet the needs of existing customers who move or change their service requirements.

15 5 U.S.C. § 601, *et seq.*

16 The RFA defines the term "small entity" as having the same meaning as *inter alia* the term "small business." 5 U.S.C. § 601(6). The term "small business" is defined in the RFA as having the same meaning as the term "small business concern" under section 3 of the Small Business Act ("SBA"). 15 U.S.C. § 632. The SBA has defined entities engaged in providing "Telephone Communications, Except RadioTelephone" to be small businesses when they have no more than 1,500 employees. 13 C.F.R.121.20 (1987).

17 None of these companies has more than 1,500 employees.

whatever transition mechanisms are necessary to minimize such adverse economic consequences.[18] The transition plan discussed herein in essential to avoid that result.

A three-year transition plan for local switching is consistent with other transition mechanisms adopted by the Commission when it has changed regulatory policy. For example, in the *ISP Remand Order*,[19] the Commission established a three-year transition plan to govern intercarrier compensation for ISP-bound traffic. In adopting the plan, the Commission acknowledged that carriers had acted in reliance on receiving reciprocal compensation for ISP-bound traffic, and that it therefore was appropriate to adopt a phase in of its new, less-compensatory pricing regime.[20]

The Commission has broad authority under the Act to adopt transition mechanisms. In adopting the line sharing transition plan referenced above, the Commission acknowledged that "[s]ection 201(b) gives the Commission broad authority to adopt the transition mechanism...and nothing in that provision limits [its] authority with respect to rates."[21] Section 201(b) similarly provides the Commission with abundant authority to adopt a transition plan for unbundled local switching.

Courts have afforded substantial deference to transition plans that the Commission previously has adopted. As stated by the Court of Appeals for the D.C. Circuit, "substantial deference by courts is accorded to an agency when the issue concerns interim relief."[22] In particular, courts have deferred to the Commission's transition plans particularly when the Commission has sought to prevent economic harm. For example, in *MCI Telecommunications Corp. v. FCC*, the court upheld the Commission's five-year phase out of the regulatory treatment of customer premises equipment ("CPE").[23] The Commission had determined that CPE should no longer be treated as a common carrier service, and had adopted a five-year plan to phase CPE out of the separations process. The court upheld the Commission's five-year plan, emphasizing that the Commission's goal was to "avoid undue economic dislocations":

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18 The RFA requires the Commission to identify and explain the reasons why any alternatives designed to minimize any significant economic impact on small entities were rejected. 5 U.S.C. § 604.

19 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 16 FCC Rcd 9151 (2001).

20 *Id.* ¶¶ 77-82.

21 *Triennial Review Order*, ¶ 267.

22 *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984).

23 *Id.*

> Since the FCC could deregulate all CPE today, it is unreasonable to preclude the agency from avoiding hardships by denying it the power to phase-out the regulations. Because there is no purely economic allocation of common costs, elements of fairness and other values must enter the analysis of the choice to be made. The FCC's actions in the prevailing climate of deregulation are not invalid. The five-year phase-out ... helps to avoid undue economic dislocations.[24]

Given the substantial deference that the courts have afforded to the Commission, the Commission need only provide the court with a reasoned explanation in support of the transition plan. In *CompTel v. FCC*, the court upheld the Commission's adoption of a "temporal transition mechanism" pursuant to which ILECs were permitted (for the time being) to recover non cost-based transport charges from interexchange carriers."[25] The court upheld the transition mechanism even though the Act required these rates to be cost-based. In upholding the transition plan, the court held that to the extent the Commission's rule departs from cost-based pricing the Commission offered a reasoned explanation for it and the departure therefore was entitled to substantial deference.[26] In the present case, adopting a transition plan to mitigate economic dislocation to CLECs and their end user customers is a sufficient—and laudable—basis for adopting a transition plan. If the Commission does not provide an adequate transition plan, CLECs will be unable to continue to serve the residential and small business customers that they serve today and end user service inevitably will be disrupted.[27]

The Commission must reject as baseless ILEC arguments that CLECs have been on notice that mass market switching would no longer be subject to unbundling and that adoption of a phased-in approach to any new rules limiting unbundling is therefore not necessary or warranted.[28] Contrary to Verizon's argument, neither the court's decision in *USTA II*, nor any other event, provides justification for the position that local switching would be 'de-listed' on a

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24 *Id.* at 142.

25 *CompTel v. FCC*, 117 F.3d 1068, 1073 (D.C. Cir. 1997).

26 *Id.*

27 Courts have upheld numerous other transition plans that the Commission or other federal agencies have adopted. For example, in *National Association of State Utility Consumer Advocates v. FCC*, the court upheld the Commission's transition to eliminating subsidies. *See, e.g., National Association of State Utility Consumer Advocates v. FCC*, 372 F.3d 454, 465 (D.C. Cir. 2004); *see also Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 437 (5th Cir. 1999) (stating "we extend the FCC greater discretion in deciding what will be sufficient during the transition period.").

28 *See* Verizon Comments at 130.

national basis. Indeed, the Commission's decision in the *Triennial Review Order*, and the state commission records developed in response to the *Triennial Review Order*, overwhelmingly support the retention of local switching as a section 251(c)(3) network element in most of the country. In the *Triennial Review Order*, the Commission found that CLECs were impaired without unbundled mass market switching on a *nationwide* basis. The state proceedings held in response to the *Triennial Review Order* further validated the Commission's conclusion that CLECs are impaired without unbundled mass market switching. Indeed, in many states the ILECs did not even challenge the impairment finding and in no state where it challenged impairment did an ILEC claim that a finding of no impairment should be made for the entire state. CLECs have had no reason to believe that the Commission would overlook the substantial evidence of impairment and eliminate mass market local switching as a section 251(c)(3) network element.[29]

Even if CLECs were on notice that local switching would be eliminated as a section 251(c)(3) network element (which they were not), this notice would not preclude the Commission from providing for a transition plan. Arguably, CLECs were on notice that the Commission would find that ISP-bound traffic was not subject to reciprocal compensation, but that did not serve—and should not have served—as a bar to implementing a viable multi-year intercarrier compensation transition plan.

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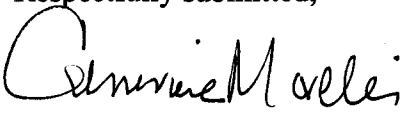
[29] The court's decision in *USTA II* does not provide any justification for failing to adopt a reasoned transition plan. In *USTA II*, the court faulted the Commission for basing its impairment finding solely on problems associated with hot cuts; the court, however, did not preclude the Commission from subsequently finding that CLECs are impaired without unbundled mass market switching once it evaluated other economic and operational factors, instead of leaving that determination to the states. *USTA II,* 359 F3d at 569.

For all of the foregoing reasons, the PACE Coalition, Talk America, and Broadview Networks respectfully request that the Commission reaffirm the transition plan set forth in the *Triennial Review Order*, as modified in their comments, for any market in which it finds that CLECs are not impaired without unbundled mass market local switching.

Respectfully submitted,



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